Supreme Court, U.S.
FILED
APR - 3 1995
OFFICE OF THE CLERK

No. 94-1571

In The

Supreme Court of the United States

October Term, 1994

VIKA L. HOWARD, individually and as personal representative of the Estate of Kenneth J. Howard,

Petitioner,

vs.

CRYSTAL CRUISES, INC., a California corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

WALTER T. JOHNSON
Counsel of Record
Two Embarcadero Center
Suite 2600
San Francisco, California 94111
Telephone (415) 984-8346

Of Counsel:

GRAYDON S. STARING
LILLICK & CHARLES
San Francisco, California 94111

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In a case to be decided under U.S. law, does the Death on the High Seas Act (46 U.S.C. App. § 761 *et seq.*) apply to a wrongful death action arising on the high seas within the territorial waters of a foreign state?

2. Is it a violation of the "collateral source" doctrine to consider the decedent husband's total household income in order to determine his rate of personal consumption and, in turn, the amount of his own income that he would have contributed to the support of his wife if he had lived?

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE WRIT 1

I. INTRODUCTION 1

II. NO CONFLICT WITH ANY OTHER COURT OF APPEALS OR WITH THIS COURT IS PRESENTED 2

III. AS TO DOHSA, NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED THAT NEEDS TO BE SETTLED BY THIS COURT .. 3

IV. THE CALCULATION OF PERSONAL CONSUMPTION IS A QUESTION OF FACT, NOT LAW 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

First & Merchants National Bank v. Adams, 1981 A.M.C. 2592 (4th Cir. 1981) 2

The Harrisburg, 119 U.S. 199 (1886) 4, 5

Leano v. States Marine Lines, 1970 A.M.C. 1694 (C.D. Cal. 1969) 2

Moragne v. United States Marine Lines, 398 U.S. 375 (1970) 4

Public Administrator of New York County v. Angela Compania Naviera, S.A., 592 F.2d 58 (2d Cir.), *cert. denied*, 443 U.S. 928 (1979) 2

Ross v. McIntyre, 140 U.S. 453 (1891) 3

Sanchez v. Loffland Bros., 626 F.2d 1228 (5th Cir. 1980) 2

United States v. Brailsford, 18 U.S. (5 Wheat.) 184 (1820) 3

United States v. Rodgers, 150 U.S. 249 (1893) 3

Waring v. Clarke, 46 U.S. (5 How.) 441 (1847) 3

STATUTE

Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* 3, 4, 5, 6

No. 94-1571

In The

Supreme Court of the United States

October Term, 1994

VIKA L. HOWARD, individually and as personal representative of the Estate of Kenneth J. Howard,

Petitioner,

vs.

CRYSTAL CRUISES, INC.,[1]
a California corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I. INTRODUCTION.

While the first question is one of law, it is not, as petitioner urges, whether DOHSA is a "general law of the forum" or whether it applies to cases arising other than on the "high seas" but whether the term "high seas" in DOHSA may include the territorial waters of foreign

[1] Crystal Cruises, Inc., is a wholly-owned subsidiary of Crystal Enterprises, Inc., which is a wholly-owned subsidiary of Nippon Yusen Kaisha K.K.

states. Courts have unanimously held that it may. The second question is one of fact only and not of law, as further discussed in Part IV below, and we therefore do not consider it at length in relation to possible conflict or the importance of its being settled by this Court.

II. NO CONFLICT WITH ANY OTHER COURT OF APPEALS OR WITH THIS COURT IS PRESENTED.

As to the first question, the only prior published decision by a U.S. Court of Appeals that speaks directly to this issue, *First & Merchants National Bank v. Adams*, 1981 A.M.C. 2592 (4th Cir. 1981), is in accord with the Ninth Circuit's decision in this case. Two other court of appeals decisions, *Sanchez v. Loffland Bros.*, 626 F.2d 1228 (5th Cir. 1980), and *Public Administrator of New York County v. Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir.), *cert. denied*, 443 U.S. 928 (1979), are less clearly on point but are also cited by the Ninth Circuit as being in accord, along with nine published decisions on the district court level and two leading authorities on maritime law. *See* Petitioner's Appendix at pp. 8-9.[2]

---

[2] *Leano v. States Marine Lines*, 1970 A.M.C. 1694 (C.D. Cal. 1969), is sometimes cited as holding to the contrary, although it contains no discussion of the issue presented here. *Leano* involved a collision that occurred twenty-two miles inside the mouth of Manila Bay. Arguably an enclosed bay or harbor, like a river or inland lake lying wholly within a foreign state, is outside the scope of the term "high seas." That issue does not arise in this case, where the accident occurred in the open coastal waters of Mexico.

As to the second question, no conflict in respect of admiralty or other federal law is presented or could be presented. The calculation of personal consumption is a question of fact, and it was treated as such in this case by both the District Court and the Court of Appeals.

III. AS TO DOHSA, NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED THAT NEEDS TO BE SETTLED BY THIS COURT.

DOHSA was not applied in this case because it is thought to be a "general law of the forum" or because both plaintiff and defendant are Americans, as petitioner suggests, but because the decedent's death was found to have been "caused by wrongful act, neglect, or default occurring on the high seas. . . . " 46 U.S.C. App. § 761. The question presented is one of statutory construction, and the answer is not in doubt. The term "high seas" has long been regarded in U.S. maritime jurisprudence as extending to the coastal waters of foreign states up to the low-water mark. *E.g., Ross v. McIntyre*, 140 U.S. 453, 471 (1891); *Waring v. Clarke*, 46 U.S. (5 How.) 441, 453 (1847); *United States v. Brailsford*, 18 U.S. (5 Wheat.) 184, 200-210 (1820). In *United States v. Rodgers*, 150 U.S. 249 (1893), Justice Field held that the Great Lakes, even within the territorial waters of Canada, fall within the meaning of the term "high seas." There is no authority for the proposition urged here by petitioner that the term "high seas" is limited to international waters.

Congress was certainly aware in 1920 when DOHSA was enacted that the term "high seas" had this broad meaning. The Congressional Record includes a letter

from an Assistant Attorney General of the United States in response to one congressman's request for a legal definition of this term as it might relate to DOHSA:

> "The high seas include the whole of the seas below high-water mark and outside the body of any county [sic]." (Bouvier's Law Dictionary.)
>
> "According to the English doctrine, the high sea begins at the distance of 3 miles from the coast of any country; according to the American view, at low-water mark, except in the case of small harbors and roadsteads within the *fauces terrae*." (Black's Law Dictionary.)
>
> The term "high seas" includes water on the seacoast without the boundaries of low-water mark. (See Ross v. McIntyre, 140 U.S. 453.) [52 Appendix to the Congressional Record 31, 34, 63rd Cong. 3rd Sess. (1914).]

The clear purpose of Congress in enacting DOHSA was to create a federal remedy for wrongful death "in cases where there is now no remedy." *Moragne v. United States Marine Lines*, 398 U.S. 375, 397 (1970), quoting 59 Cong. Rec. 4486. In 1886 this Court had held that no right of action for wrongful death existed under general maritime law. *The Harrisburg*, 119 U.S. 199 (1886). In cases like this one, where U.S. law applies, claimants were left with no remedy at all. DOHSA was enacted in 1920 to fill this gap. By its terms, DOHSA applies to all wrongful death actions arising "on the high seas" with the exception of the Great Lakes, the Panama Canal Zone, and the territorial waters of the States, where Congress deemed that local wrongful death statutes were sufficient. *Moragne*, 398 U.S. at 397-98.

Petitioner suggests here that Congress intended to repudiate *The Harrisburg* only in part, leaving an entire class of claimants, those whose actions arose in foreign territorial waters, still without a remedy. Nothing in DOHSA or its legislative history supports this proposition. Petitioner's citations to commentary on earlier and different versions of the Act which did not become law are irrelevant.

IV. THE CALCULATION OF PERSONAL CONSUMPTION IS A QUESTION OF FACT, NOT LAW.

The District Court determined decedent's rate of personal consumption by multiplying the total household income by 30%. The Court treated this as a question of fact only. Appendix at pp. 38-40. The Ninth Circuit also treated it as a question of fact:

> The appellant's own economic expert expressed the concept of "personal consumption" in terms of a percentage of total household income, and relied on a chart (the so-called "Cheit Table") which showed that the average head of household in a two-person/two income household consumes 30% of the total household income. [Appendix at pp. 10-11.]

Petitioner tried to show that her husband had been an exceptionally frugal man who consumed only 30% of his own personal income. However, the District Court found that the petitioner's allegations in this regard were unsupported by the evidence, Appendix at p. 39, and the Ninth Circuit found "no clear error" in this determination. *Id.* at p. 11.

Petitioner does not now contend that the District Court's calculation of the decedent's personal consumption was incorrect as a matter of fact. Instead, petitioner tries to characterize it as an error of law by invoking the "collateral source" doctrine. As the Ninth Circuit points out, petitioner cites no relevant legal authority in support of her position. *Id.* Indeed, her position makes no sense. The District Court was merely applying the findings of an empirical study, proffered by petitioner's own expert, to estimate the decedent's personal consumption and, in turn, the amount of support that the decedent might reasonably have been expected to contribute to his wife in the future had he lived. The District Court gave no consideration to new and collateral sources of income that might have become available to the petitioner in the future; rather, the Court based its determination of future support on what the decedent had in fact provided in the past.

CONCLUSION

The issues raised by Petitioner do not warrant hearing by this Court. There is no conflict among the circuits, or even among the district courts, with respect to the DOSHA question. The term "high seas" has long been understood by this Court, and was understood by Congress when DOHSA was enacted, as encompassing the territorial waters of foreign states. Further, the calculation of personal consumption is a factual issue. It does not present a legal issue at all, let alone one that merits consideration by this Court.

The Petition should be denied.

Respectfully submitted,

WALTER T. JOHNSON
Counsel of Record

Of Counsel:

GRAYDON S. STARING
LILLICK & CHARLES
San Francisco, California 94111